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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM—1954

No. 343

THE AMERICAN FEDERATION OF MUSICIANS, a voluntary organization, JAMES C. PETRILLO, individually and as President of The American Federation of Musicians, and GEORGE COOPER, individually and as Representative of The American Federation of Musicians, Local Union Number 257 with offices in Nashville, Tennessee,

Petitioners,

against

ABE STEIN, a resident of Davidson County, Tennessee,

Respondent.

PETITIONERS' REPLY BRIEF

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JUDICIAL PRINTING CO., INC., 82 Beekman St., N. Y.—BEekman 3-9084-5-6 182

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PETITIONERS' REPLY BRIEF

Respondent's brief in opposition to the petition for certiorari only serves to emphasize three of the points urged by petitioners as reasons for granting the writ and reversing the judgment below:

1. There is no diversity of citizenship.

2. There was no service of process on two of the petitioners.

3. The Court below failed to pass on the jurisdictional questions raised before the District Court, on the erroneous ground that the District Court had, in effect, issued a tem-

porary stay and would hold a further hearing to consider and determine its jurisdiction. It is now 14 months since the petitioners were put under restraint, and each passing month makes more clear, if that is possible, what never was in doubt, that the District Court did not regard its injunction as tentative, pending consideration of the jurisdictional issues. It has not ordered, nor did it condition its injunction upon, a hearing on its jurisdiction, to say nothing of its failure to set for argument the motion to vacate and motions to dismiss the complaint (Resp. Br., pp. 3-4)—all of which again raised the jurisdictional questions. Contrary to respondent's suggestion (Resp. Br., p. 4), petitioners do not rely in their petition on any questions relating to the failure of the District Court, for more than a year, to hear the motions. The petition refers to the lack of any action on the motion to vacate only to support the conclusion which is inescapable from the order issuing the injunction—that the District Court had no intention of further examining the jurisdictional issues prior to trial. The additional motions mentioned in respondent's brief (Resp. Br., pp. 3-4) and the like failure of the District Court to act on them, surely corroborates that something is shockingly wrong in the administration of justice by injunction in the Middle District of Tennessee.

This reply brief is filed to point out the arguments made in the petition which have gone unanswered—major ones, in fact—and the misleading and improper nature of respondent's arguments:

1. Respondent's brief in opposition does not even attempt to answer the point that no diversity existed because, as the complaint itself alleges, Stein (the plaintiff) and Cooper (one of the defendants) are both citizens of the State of Tennessee.

2. (a) Nor has respondent attempted to answer the point that the Court of Appeals was required to pass upon

the jurisdictional issues which had been squarely presented to it upon the appeal. Respondent acknowledges that the District Court heard evidence and argument on the issue of jurisdiction (Resp. Br., pp. 3, 25), but by contrast with the opinion of the Court below, makes no claim that the District Court desired more time to consider these issues.

(b) Respondent, after stating that petitioners made two motions to dismiss the action and one to vacate the temporary injunction, asserts that no effort was made to have *one* of the motions to dismiss heard (Resp. Br., p. 3).

We know of no action which a party is required to take to have a motion heard other than to notice it for argument. That was done in the case of all the motions. As respondent acknowledges, petitioners unsuccessfully sought to have another Judge designated by the Chief Judge of the Court of Appeals to hear the motion to vacate when the District Judge became unavailable (Resp. Br., p. 5). In addition, petitioners wrote to the District Judge urging that the motion be heard, but the Judge replied that he could not set the motion for argument because he was busy with trials at least until February 1, 1954 (Record, pp. 20-1), and, to date, he has not heard the motion.

(c) Respondent alleges (Resp. Br., p. 2) that the motion for a temporary injunction was heard in part on August 5, 1953 and was carried over to August 7, 1954. As the record plainly shows, the District Court directed that a temporary injunction issue at the hearing of August 5, 1954. The additional hearing of August 7, 1953 was held, upon the request of Mr. Stokes made on August 6, 1953 (Record, p. 66), for the sole purpose of hearing the jurisdictional issues again. After that hearing, the injunction issued, unsupported by findings.

3. A number of misstatements are made by respondent on the question of service of process. The assertion that

petitioners admitted service of process is based on extracts from alleged material (Resp. Br., pp. 19-22) which was not in the printed transcript before the Court of Appeals and is not in the transcript certified to this Court. Moreover, the material quoted fails to support the conclusion drawn from it.

In the alleged material, the District Judge asked if "process or notice" had been served on the "National Union".* Respondent's counsel replied that it had been served on the Union in New York, but not upon Mr. Stokes** (attorney for Cooper) (Resp. Br., p. 19). When asked how such service was made, respondent's counsel merely asserted that he had mailed a copy of the notice of motion, of the motion and of the complaint to Mr. Petrillo (Resp. Br., p. 20). Of course, counsel's assertions, even if made, are not proof of the statements alleged.

Since the "Federation" (the unincorporated association) was not added as a party until the end of the August 7 hearing, the colloquy of August 5 could not have dealt with it. As to the claim of service on Mr. Petrillo, uncontradicted proof in the record shows that respondent mailed to Mr. Petrillo only a copy of the motion and the notice of motion, and not of the complaint (Record, p. 32). Neither service of process nor of the notice of motion was made upon the "Federation", and there is not even a claim to the contrary.

Respondent emphasizes a portion of the alleged material to claim a waiver of service of process and of notice of the motion for temporary injunction (Resp. Br., p. 22), but the material itself refers only to waiver of notice of the motion, not of service of process.

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* At this point, the Federation (the unincorporated association) was not even a party to the action. This reference therefore was to the corporation bearing the name, the American Federation of Musicians.

** This extract conflicts with respondent's statement on page 2 of his brief that notice of the motion was handed to Mr. Stokes. (See Record at pp. 64-5.)

Even if all of respondent's unproved claims of the proceedings are accepted, they do not prove service of process upon either Mr. Petrillo or upon the "Federation". Under the Federal Rules of Civil Procedure, service of the summons or complaint must be made by a United States marshal, his deputy or a person specially appointed by the Court for that purpose (Rule 4(c)), and service must be made within the state in which the district court is held in a diversity action (Rule 4(f)). There is no claim that any service was made by an authorized person upon Mr. Petrillo within the State of Tennessee.

The "Federation" was added as a party at the close of the hearing of August 7, 1953. No attempt was made to serve it, and the injunction order recites that service was unnecessary because Mr. Stokes appeared specially at the hearing to contest jurisdiction—a position in conflict with a decision of this Court (Pet., p. 12).

The complete answer to respondent's improper arguments as to service of process based on extracts of material not in the certified record is in the docket entries (Record, pp. 32-5). There is no entry showing service of process on either the "Federation" or Mr. Petrillo.

4. The cases cited by respondent in his brief at pages 8-18, while discussed in connection with the issue of the citizenship of an unincorporated association, do not deal with that question. Most of them relate to whether an unincorporated association may be sued as an entity. The one cited case which does deal with the question of the citizenship of the association entity, *Russell* v. *Central Labor Union*, 1 F. (2d) 412, is squarely opposed to respondent's contention (See quotation, Resp. Br., p. 17).

Moreover, the question of the citizenship of an unincorporated association, to which respondent devotes most of his brief, was not passed upon by the Court of Appeals.

This failure is one of the grounds upon which we ask this Court to issue its writ and set the case down for oral argument, if it does not reverse without argument, after allowing the writ because of the lack of diversity and the lack of service of process.

Respectfully submitted,

MURRAY GARTNER,
Attorney for Petitioners.

EMANUEL L. GORDON,
JORDAN STOKES, III,
Of Counsel.

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Petitioners,

vs.

ABE STEIN, a Resident of Davidson County, Tennessee,

Respondent.

No. 343.

RESPONSE TO PETITIONERS' REPLY BRIEF.

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RESPONSE TO PETITIONERS' REPLY BRIEF.

The Respondent, Abe Stein, in answer to the Petitioners' Reply Brief, heretofore filed in this cause, states as follows:

The Reply Brief as filed by Petitioners again attempts to project into this record facts which do not exist and to make arguments that have no bearing whatsoever on the matters brought before the United States Circuit Court of Appeals by the Petitioners' Appeal completed September 2nd, 1953.

Respondent again respectfully points out to this Honorable Court that on August 26, 1953, Notice of Motion to Dissolve or Vacate the Temporary Injunction entered on August 7th, 1953, was filed in the United States District Court; on September 2nd, 1953, Notice of Appeal from this order was filed by Petitioners thereby stopping any action which the District Court could take on the motion to dissolve the injunction, and transferring the entire matter to the United States Circuit Court of Appeals at Cincinnati for review of the order of August 7th, 1953. It is a clear and well established principle that any matters pending in the United States District Court could not be heard, nor set for a hearing, until the disposition of appeal taken by Petitioners.

It is absurd for Petitioners to allege that the record in this cause and statements quoted from the Response to the Petition for Writ of Certiorari corroborate Petitioners' unwarranted allegation "that something is shockingly wrong in the administration of justice by injunction in the Middle District of Tennessee". Respondent denies this statement and charges that same was made by Petitioners in a desperate effort to discredit and reflect upon the sincerity and integrity of the Honorable Elmer D. Davies, Judge of the United States District Court for the Middle District of Tennessee, and Respondent further charges that Petitioners' reckless disregard of the facts as developed and disclosed by this record is deliberately calculated to confuse, mislead and direct the court's attention away from the matter in controversy. This attempt made by Petitioners is clearly shown by the studied refusal of Petitioners to rely on the facts and the record before this court.

Respondent respectfully states that George Cooper, one of the defendants, was sued only as the representative of the American Federation of Musicians, Local Union No.

257, with offices in Nashville, Tennessee, in the original complaint, he was not sued "individually", also as Petitioners now allege. The record shows that at the hearing on August 5th, 1953, the reason for making George Cooper a party defendant was simply because he was at the time serving as president of the Local Union No. 257 of the American Federation of Musicians, which Respondent alleged was a part of the American Federation of Musicians.

At pages 5 and 6 of the Transcript of the hearing of August 5th, 1953 (referred to as Folio No. 1 in the Response), it appears:

> "The Court: Now, you have sued the Local Union of the Musicians, have you?
>
> Mr. Lester: Yes, sir.
>
> The Court: How do you propose to get process served on the American Federation of Musicians?
>
> Mr. Lester: Well, this local chapter here, or local Union, whatever they call it, is a part of The American Federation of Musicians, and I am just assuming that the rules of the Federal Court and our State statutes would give us the right to——
>
> The Court: (Interposing) Are they doing business in this State?
>
> Mr. Lester: Yes, sir, I think that they certainly are doing business in this State. And, of course, the fact that they have a local union here is proof that they are doing business here. And that is the test. They have their offices here; they have their membership here; they have an elected official here. They are American Federation of Musicians and for that reason they have been included in this lawsuit.
>
> The Court: Now, what relief are you asking against the local union?
>
> Mr. Lester: Well, I'm just including them with the American Federation of Musicians because they are a part of it" (Folio No. 1—pages 5 and 6).

It is evident that Petitioners by their own action have prolonged the temporary injunction by filing Notice of Appeal in the United States District Court, on September 2nd, 1953, only six days after having filed a Notice of Motion to Dissolve or Vacate the Temporary Injunction and before any action could be taken by the Court on the first motion of Petitioners. Any criticism of that which Petitioners alleged to be unwarranted and unreasonable delay of this matter is attributable solely to the action of Petitioners and should not be considered a dereliction on the part of the lower court.

CONCLUSION.

Respondent respectfully submits that the Petitioners' Reply Brief adds nothing to the record in this cause and that the Writ of Certiorari sought and prayed for by Petitioners should not be granted. The learned Opinion of June 20th, 1954, of the United States Circuit Court of Appeals for the Sixth Circuit should be adopted by this Honorable Court as the guide to be followed in acting upon the petition and deny its prayer for a Writ of Certiorari.

Respectfully submitted,

JONATHON J. FOLEY, JR.,
Attorney for Respondent, Abe Stein.

HARRY S. LESTER,
Of Counsel for Respondent.

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PETITIONERS' SURREBUTTAL

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PETITIONERS' SURREBUTTAL

We would not burden the Court with this additional memorandum except for respondent's persistence in endeavoring to mislead the Court.

1. Respondent in its rebuttal memorandum (p. 2) claims that the District Court failed to hear petitioners' motion to vacate the temporary injunction because, no district judge being available to hear the motion, a notice of appeal was filed, just prior to the expiration of time to appeal. The simple answer to this argument is that the petition for certiorari is based on the Court of Appeals' failure to decide jurisdictional questions. The only bearing of the District Court's lack of action on the motion to vacate is to demonstrate, if demonstration were necessary, that the temporary injunction was not, in fact, issued pending a further hearing on the jurisdictional questions.

In any case, respondent's argument that the motion to vacate was not heard because petitioners filed their notice of appeal is clearly wrong. When petitioners wrote to the District Judge months later, inquiring as to when the motion to vacate would be heard (Record, p. 20), he did not suggest any lack of power to hear the motion; he merely replied that he was too busy to hear it (Record, p. 21).* And under Rule 62(c) of the Federal Rules of Civil Procedure, the District Court had power to vacate or suspend the injunction, at least pending the appeal.

2. Respondent asserts (Resp., p. 3) that defendant Cooper was not sued individually but only as representative of Local 257. In support of his claim he quotes from an alleged colloquy which was not in the printed record before the Court of Appeals and is not part of the certified transcript here. Aside from the fact that this alleged material fails to state what respondent claims it shows, the only statement in the complaint relating to defendant Cooper states "That the defendant, George Cooper, is a citizen of the State of Tennessee" (Record, p. 36). We submit that the body of the complaint names Cooper only as an individual defendant.** Moreover, diversity of citizenship is absent whether Cooper is sued individually or in a representative capacity.

Respectfully submitted,

MURRAY GARTNER,
Attorney for Petitioners.

EMANUEL L. GORDON,
JORDAN STOKES, III,
Of Counsel.

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* Clearly, a lack of power, even had it existed, would not be ground for failing to call a motion on the calendar to be heard, particularly when no answering affidavit or papers in opposition had been filed. Respondent's argument is merely a flight of imagination.

** We note that respondent makes no claim that he is not suing defendant Petrillo individually, although the caption names him only in a representative capacity.